IN THE UNITED STATES SUPREME COURT
October Term, 1989

Case No. 89-6347

FRANK ELIJAH SMITH,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER THE ELEVENTH CIRCUIT PANEL'S DISPOSITION OF THE PETITIONER'S CLAIM UNDER **ENMUND v. FLORIDA**, 458 U.S. 782 (1982), BY RELYING SOLELY UPON A GENERAL STATE COURT ACCOMPLICE LIABILITY/FELONY MURDER SUFFICIENCY DETERMINATION, ALTHOUGH NO FINDING UNDER **ENMUND** HAS BEEN MADE BY THE STATE COURTS, IS CONTRARY TO THIS COURT'S DECISION IN **CABANA v. BULLOCK**, 474 U.S. 376 (1986), AND IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL APPLYING **BULLOCK**.

II.

WHETHER THE ELEVENTH CIRCUIT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND DEATH SENTENCE NOTWITHSTANDING THE FACT THAT THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON PETITIONER'S SOLE DEFENSE TO THE CAPITAL CHARGE IS IN CONFLICT WITH AND CONTRARY TO THIS COURT'S DECISIONS IN **IN RE WINSHIP**, 397 U.S. 358 (1970), **MULLANEY v. WILBUR**, 421 U.S. 684 (1975), **BECK v. ALABAMA**, 447 U.S. 625 (1980), AND **CRANE v. KENTUCKY**, 106 S.Ct. 2142 (1986), IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL, AND IS IN CONFLICT WITH THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

III.

WHETHER, GIVEN THE PENDENCY OF **BLYSTONE v. PENNSYLVANIA**, 109 S.Ct. 1567 (1989), **BOYDE v. CALIFORNIA**, 109 S.Ct. 2447 (1989), **WALTON v. ARIZONA**, 110 S.Ct. 49 (1989), AND **SAFFLE v. PARKS**, 109 S.Ct. 1930 (1989), CERTIORARI REVIEW SHOULD BE GRANTED TO REVIEW THE DECISION BELOW ALLOWING THE EXECUTION OF MR. SMITH'S SENTENCE OF DEATH NOTWITHSTANDING THE FACT THAT THE TRIAL JUDGE'S PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. SMITH TO PROVE THAT DEATH WAS NOT APPROPRIATE AND LIMITED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, AND WHETHER THE DECISION BELOW IS IN CONFLICT WITH AND CONTRARY TO THIS COURT'S DECISIONS IN **MULLANEY v. WILBUR**, 421 U.S. 689 (1975), **MILLS v. MARYLAND**, 108 S.Ct. 1860 (1988), **LOCKETT v. OHIO**, 438 U.S. 586 (1978), **HITCHCOCK v. DUGGER**, 107 S.Ct. 1821 (1987), AND **PENRY v. LYNAUGH**, 109 S.Ct. 2934 (1989), AND IS IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN **ADAMSON v. RICKETTS**, 865 F.2d 1011 (9th Cir. 1988) (EN BANC).

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The Respondent, Richard L. Dugger, submits that Frank Elijah Smith's Petition for Writ of Certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals entered March 9, 1988, rehearing denied October 5, 1989, should be denied.

OPINION BELOW

The order of the Eleventh Circuit affirming the denial of Smith's petition for writ of habeas corpus is reported at **Smith v. Dugger**, 840 F.2d 787 (11th Cir. 1988). The order denying rehearing, dated October 5, 1989, is appended to Smith's certiorari petition, attachment "2".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts Smith's statement.

STATEMENT OF THE CASE

Frank Elijah Smith was convicted of first-degree murder and was sentenced to death in the Circuit Court for the Second Judicial Circuit in and for Wakulla County, Florida. The Florida Supreme Court affirmed the judgment and sentence in **Smith v. State**, 424 So.2d 726 (1982). Smith returned to the trial court seeking post-conviction relief which was subsequently denied. The Florida Supreme Court affirmed said denial in **Smith v. State**, 457 So.2d 1380 (Fla. 1984). Smith then filed an original petition for writ of habeas corpus in the United States District Court for the Northern District of Florida. Contained therein, Smith asserted that his death sentence did not comport with the decision in **Enmund v. Florida**, 458 U.S. 782 (1982); that the trial court's refusal to instruct the jury on Smith's sole defense violated due process; and that the trial court's instructions "shifting the burden to Smith" to prove that life was the appropriate sentence, violated the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. The specific claims raised by Smith are set forth in the Eleventh Circuit's opinion in **Smith v. Dugger**, 840 F.2d at 789-791, ns. 1, 2, 3 and 4. The District Court denied Smith's petition and he

appealed said denial to the Court of Appeals for the Eleventh Circuit. The District Court, in reviewing the eighteen (18) issues raised, ruled on the merits regarding the **Enmund** issue and found that the jury instruction issue regarding withdrawal and the burden shifting issue were procedurally barred.

On March 9, 1988, in **Smith v. Dugger**, 840 F.2d 787 (11th Cir. 1988), the Eleventh Circuit issued an opinion denying all relief. That court ruled on the merits of the **Enmund** claim; found the jury instruction withdrawal claim to be without merit and determined that Smith's burden shifting issue was procedurally barred. Smith filed a suggestion for rehearing **en banc** and petitioned for rehearing which was ultimately denied on October 5, 1989. Smith's motion for stay of mandate pending application for writ of certiorari, filed pursuant to Fed.R.App.P. 41(b), was denied on October 24, 1989 and mandate issued that day.

On January 10, 1990, the Governor of Florida, Bob Martinez, signed a second death warrant setting the execution week to commence noon, Thursday, the 8th of February, 1990, and to end noon, Thursday, the 15th of February, 1990. The execution is set for 7:00 a.m., Friday, February 9, 1990.

On July 31, 1989, Smith filed a second motion for post-conviction relief in the state trial court. Said motion is pending resolution following oral argument held Friday, January 26, 1990.

STATEMENT OF THE FACTS

A brief but thorough statement of the facts may be found in the Eleventh Circuit Court's opinion in **Smith v. Dugger**, 840 F.2d at 789. Facts germane to each of the questions presented will be more specifically set forth in the text of each argument.

REASONS FOR DENYING THE WRIT

CLAIM I

> THE ELEVENTH CIRCUIT'S DISPOSITION OF PETITIONER'S CLAIM UNDER **ENMUND v. FLORIDA**, 458 U.S. 782 (1982), IS CORRECT AND DOES NOT CONFLICT WITH **CABANA v. BULLOCK**, 474 U.S. 376 (1986), AND **TISON v. ARIZONA**, 107 S.Ct. 1767 (1987).

The Eleventh Circuit opined, in **Smith v. Dugger**, 840 F.2d at 792-793, that the dictates of **Enmund** had been satisfied in this case. This result obtained after the court, in detail, discussed the holdings in **Tison v. Arizona**, 107 S.Ct. 1767 (1987), and **Cabana v. Bullock**, 474 U.S. 376 (1986). Specifically, the court observed:

> To recent Supreme Court cases have limited and clarified **Enmund**. In **Tison v. Arizona**, (cite omitted), the court held that a defendant who participates in a felony that results in murder may be sentenced to death constitutionally so long as his participation in the felony was major and his mental state was one of reckless indifference to the value of human life.
>
> In **Cabana v. Bullock**, (cite omitted), the Supreme Court determined that the requisite culpability finding should be made at some level in state court. The court held that such a finding is entitled to a presumption of correctness in federal court, pursuant to 28 U.S.C. §2254(d).
>
> This trilogy of cases directs the federal courts to handle and **Enmund** claim by

> reviewing the record of the entire course of state proceedings to determine if a culpability finding has been made at some point. Such a review in this case leads us to reject Smith's **Enmund** claim.

840 F.2d at 792.

The court further observed that the written findings in support of the imposition of the death penalty by the trial judge satisfied the **Enmund, Cabana, Tison** trilogy and that the Florida Supreme Court, in **Smith v. State**, 424 So.2d 726, 733 (Fla. 1983), ratified that conclusion because:

> Implicit in this finding is the conclusion that Smith had the intent to kill. Smith's culpability has been properly examined in the state court and found to be sufficient to justify imposition of the death penalty.

Smith v. Dugger, 840 F.2d at 793.

Contrary to Smith's contention that the Florida Supreme Court's holding was only "a sufficiency" finding, the record reflects that the trial court made written findings in support of the imposition of the death penalty for Frank Smith. The evidence at trial revealed that before renting the motel room as well as during the time the codefendants were raping Sheila Porter at the motel, Smith and Johnny Copeland talked about killing her. (TR 2370-2371, 2373-2402). The two men were particularly worried about Sheila Porter testifying against them. (TR 2374). It was Victor Hall's testimony that both Copeland and Smith wanted to kill Sheila (TR 2374), and when they drove to Tram Road and parked, Smith got out, pulled the girl from the car, and, along with Copeland, led the victim into the woods by the arm. (TR 2375-2377). Subsequently, Hall heard three shots

some two seconds apart and then saw Smith emerge from the woods with the gun in his hand. (TR 2377-2378, 2470).

Other evidence showed that Smith was seen during the week prior to the murder of Sheila Porter with a .25 caliber pistol and had actively solicited ammunition for the pistol. (TR 2470-2480). The gun used to kill Sheila Porter was a .25 caliber automatic. (TR 2524-2548).

The Eleventh Circuit, in reviewing this record, ascertained that a requisite finding pursuant to **Tison, supra**, and **Bullock, supra**, was made not only at the trial level but at the Florida Supreme Court level. As observed in **Cabana v. Bullock, supra**, there is no specific requirement that the trial court, rather than an appellate court, make the requisite **Enmund** finding, said decision only requires that the finding be made at some point during the state judicial process.

Smith has not demonstrated conflict in the Eleventh Circuit's analogy of this trilogy as it applies to Smith's case and he has failed to assert a basis upon which certiorari review should be granted.

GROUND II

THE ELEVENTH CIRCUIT'S AFFIRMANCE OF PETITIONER'S CONVICTION AND DEATH SENTENCE REGARDING THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON PETITIONER'S "SOLE DEFENSE" TO THE CAPITAL CHARGES IS NOT IN CONFLICT WITH AND CONTRARY TO THIS COURT'S DECISIONS IN **IN RE WINSHIP**, 397 U.S. 358 (1970), **MULLANEY v. WILBUR**, 421 U.S. 684 (1975), **BECK v. ALABAMA**, 447 U.S. 625 (1980), AND **CRANE v. KENTUCKY**, 106 S.Ct. 2142 (1986), AND IS NOT CONTRARY TO THE HOLDINGS OF OTHER COURTS OF APPEAL AND IN CONFLICT WITH THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Without showing how the Eleventh Circuit's reasoning was in error, with regard to the facts and circumstances of the case herein to be reviewed, Smith argues the Eleventh Circuit's decision is in conflict with the aforenoted opinions. Respondent would disagree and submits that no relief should be forthcoming as to this claim.

In **Smith v. Dugger**, 840 F.2d at 791, 792, the court addressed the merits of this claim, albeit the State has steadfastly maintained that the issue was procedurally barred. This is so because Smith raised this claim in the state courts based on state law and did not argue federal constitutional law. He therefore failed to preserve the instant claim. As the Eleventh Circuit recognized in **Anderson v. Harless**, 459 U.S. 4 (1982), but contrasted same with **Hutchins v. Wainwright**, 715 F.2d 512 (11th Cir. 1983), as to whether a defendant has sufficiently presented a claim to a state court and inherent therein, argued federal constitutional violations. Respondent would submit that as to this issue, the claim is procedurally barred and that the Eleventh Circuit was in error in addressing the merits.

The Eleventh Circuit observed, however:

> We need not decide the procedural default issue here, however, because going to the merits it is apparent there is no substance to the constitutional claim. Smith argues that the due process right to a conviction based on proof of guilt beyond a reasonable doubt requires a trial court to charge the jury on a defense which is timely requested and supported by the evidence. Even if this argument is found as a matter of principle, it avails Smith nothing because the instruction he now argues should have been given was never requested, and the evidence did not support the instruction he requested.

840 F.2d at 791.

The court set forth Smith's claims as follows:

> . . . First, he recites the constitutional underpinnings of the right to a theory of defense instruction; second, he notes that under Florida law, withdrawal is a defense to felony murder or to premeditated murder under an accomplice theory; and third, Smith asserts that there is ample evidence to support the defense in his pretrial statements which were introduced by the State in its case-in-chief. In these statements, Smith confessed to participating in the robbery and kidnapping, but maintained that he tried to talk his accomplice, Johnny Copeland, out of killing the victim.

840 F.2d at 791-792.

In reciting what the actual instruction requested was, the court noted:

> At trial, Smith requested the following jury instruction for his withdrawal defense:
>
> > Ladies and gentlemen of the jury, one of the defenses raised in this case is the defense of withdrawal. It is a valid defense to the charge of felony murder that the defendant withdrew from the commission of the felony upon which the felony murder charge is based before the death of the

> victim occurred. **A party may withdraw from a criminal transaction and avoid criminal liability by communicating his withdrawal to the other party in sufficient time for them to consider terminating their criminal plan and refraining from committing the contemplated crime. If you find from the evidence that the defendant withdrew from the offenses of robbery and kidnapping before the death of the victim then he is not criminally responsible for the death of the victim and you must find him not guilty of murder. If, on the other hand, you are convinced beyond a reasonable doubt that the defendant did not withdraw from the offense of robbery and kidnapping, and you are otherwise convinced of his guilt beyond a reasonable doubt then you must find him guilty of first degree murder, or a lesser included offense.**
>
> This instruction refers to withdrawal only from the underlying felonies as a defense to felony murder. At trial, Smith never submitted or otherwise requested an instruction on withdrawal as a defense to premeditated murder under an accomplice theory.
>
> Smith's felony murder charge was predicated on the offenses of kidnapping and robbery. In order for the jury to be charged with Smith's proposed instruction, Smith had to produce evidence that he withdrew from the kidnapping or the robbery before the victim's death. The record reveals no evidence on Smith's withdrawal from the underlying felonies. On the contrary, Smith admitted full participation in these offenses in his pretrial statements introduced by the State.
>
> There is no due process violation in the trial court's refusal to give the instruction in these circumstances.

840 F.2d at 792. (Emphasis supplied).

The only evidence at trial upon which Smith relies in arguing that he was entitled to this instruction was his final pretrial statement to the police. The statement was brought out through the testimony of State witnesses and had been the subject of an earlier motion to suppress. In that statement, Smith admitted robbing and kidnapping Sheila Porter, but stated that both at the motel and in the woods on Tram Road where Sheila Porter died, he had attempted to talk his codefendant, Johnny Copeland, out of killing Ms. Porter. (TR 2254-2268). Given Smith's admissions concerning his participation in the kidnapping and robbery, Smith's proposed instruction was wholly inapplicable. No view of the evidence can support the conclusion, required by the proposed instruction, that Smith "withdrew from the offenses of robbery and kidnapping". Smith's admission to the commission of the underlying felonies negates any contention heretofore made that Smith attempted to withdraw. Moreover, the requested jury instruction would not have covered the circumstances for which he now seeks relief. In sum, because Smith admitted that he participated in the underlying felonies and because such participation naturally contributed to the death of the victim by placing her in a position to be killed, there was absolutely no evidentiary support for Smith's proposed instruction on withdrawal. This is so even if the instruction had included language to the effect that withdrawal can take place even after the underlying felonies are completed. The decision rendered by the Florida Supreme Court and ratified by the Eleventh Circuit Court of Appeals in its discussion of this

issue does not conflict with the authorities set forth by Smith in his petition. He has raised no federal claim warranting the granting of certiorari review.

GROUND III

> THE DECISION BELOW ALLOWING MR. SMITH'S SENTENCE OF DEATH TO STAND NOTWITHSTANDING THE FACT THAT THE TRIAL JUDGE'S PENALTY PHASE JURY INSTRUCTION "SHIFTED THE BURDEN TO MR. SMITH TO PROVE THAT DEATH WAS NOT APPROPRIATE" AND LIMITED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGH AGGRAVATING CIRCUMSTANCES IS NOT IN CONFLICT WITH AND CONTRARY TO DECISIONS OF THIS COURT AND IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN **ADAMSON v. RICKETTS**, 865 F.2d 1011 (9th Cir. 1988) (EN BANC).

Smith argues for seventeen (17) pages in his certiorari petition that his constitutional rights have been violated because the jury instruction read at the penalty phase of his trial "shifted the burden to him to prove that death was not the appropriate sentence". What he does not acknowledge is that the Eleventh Circuit, in **Smith v. Dugger**, 840 F.2d at 796, found this claim to be procedurally barred. The court specifically held, after reciting the laundry list of allegations as to why the sentencing proceeding was flawed, that:

> Smith raised these claims for the first time in his motion pursuant to Rule 3.850. The Florida Supreme Court refused to address the merits of these arguments because they "could have been presented on appeal" and were not. **Smith v. State**, 457 So.2d 1380, 1381 (Fla. 1984). Smith has not shown sufficient cause or prejudice to excuse his failure to raise these claims on direct appeal. Procedural default thus bars consideration of these issues.
>
> On appeal, Smith does not deny procedural default. Rather, he contends that Florida so

> arbitrarily and consistently enforces its rule against collateral consideration of matters not raised on direct appeal that the rule is not an adequate procedural bar under **Wainwright v. Sykes**, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). This precise contention has been expressly rejected by this Court in **Booker v. Wainwright**, 764 F.2d 1371, 1379 (11th Cir.), **cert. denied**, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985), and **Hall v. Wainwright**, 733 F.2d 766, 777 (11th Cir. 1984), **cert. denied**, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). In these cases, this Court found the Supreme Court of Florida is consistent in its application of the contemporaneous objection and procedural default rule in capital cases.

840 F.2d at 796.

This Court likewise in **Dugger v. Adams**, ___ U.S. ____, 109 S.Ct. 1211 (1989), similarly found that Florida maintains a strict procedural bar rule.

Pursuant to **Wainwright v. Sykes**, 433 U.S. 72 (1977), Smith is entitled to no relief.

It should be further noted that the error asserted is constitutional error not fundamental error. Pursuant to **Rose v. Clark**, 478 U.S. 570 (1986), an objection should have been lodged. Nor has Smith overcome the requirement of showing cause and actual prejudice pursuant to **Murray v. Carrier**, 477 U.S. ____, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), citing **Engle v. Isaac**, 456 U.S. 107 (1986). Cause can not be demonstrated. Moreover, the Eleventh Circuit, in its opinion heretofore cited, held that Smith had not shown sufficient cause or prejudice to excuse his failure to raise these claims.

Smith observes that seven (7) cases are now pending before this Court involving very similar questions. Citing to **Blystone**

v. Pennsylvania, 109 S.Ct. 1567 (1989); **Boyde v. California**, 109 S.Ct. 2447 (1989); **Walton v. Arizona**, 110 S.Ct. 49 (1989); **Hamblen v. Dugger**, Case No. 89-5121 (1989); **Kennedy v. Dugger**, Case No. 89-5990 (1989), and **Tompkins v. Florida**, Case No. 89-6166 (1989). What Smith fails to point out is that **Blystone**, **Boyde** and **Walton** have all been accepted for review (and at this juncture argued) and also involved other statutory schemes than that of Florida. With regard to **Hamblen**, **Kennedy**, and **Tompkins**, certiorari petitions are pending and Smith has not explained whether the procedural postures in those cases are identical to the instant cause. Moreover, under the Florida Statutes and in particular with regard to the instruction given **sub judice** (a standard instruction), the State must prove aggravating factors beyond a reasonable doubt. There is no burden placed upon Smith with regard to the presentation of mitigating evidence. Smith's reliance on the Ninth Circuit's opinion in **Adamson v. Ricketts**, 865 F.2d 1011 (9th Cir. 1988) (**en banc**), citing to **Jackson v. Dugger**, 837 F.2d 1469 (11th Cir. 1988), does not support such a conclusion. In **Jackson v. Dugger**, the Eleventh Circuit found that the instruction therein (which was not the standard jury instruction), "impermissibly tilted the scales by which the sentencer was to balance aggravating and mitigating circumstances in favor of the State." **Jackson v. Dugger** is distinguishable from the facts **sub judice**.

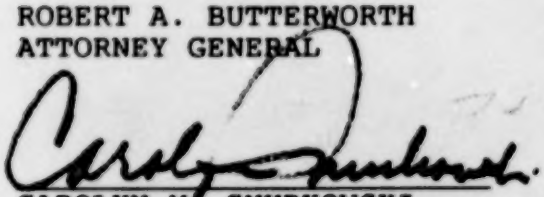
It is respectfully submitted that the issue was properly found to be procedurally barred by the Eleventh Circuit and Smith has failed to overcome said bar **sub judice**.

CONCLUSION

Based on the foregoing, Respondent would urge this Court to deny Smith's Petition for Writ of Certiorari as to all questions presented.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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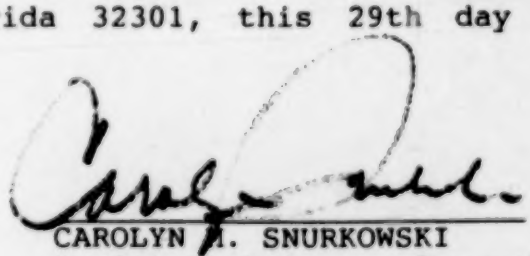
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ~~U.S. Mail~~ hand delivered to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 29th day of January, 1990.



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